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IN THE

SUPREME COURT OF THE UNITED STATES

NATION E. MEYER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

NO. 79-5530

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

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| NATION E. MEYER, Petitioner, vs. UNITED STATES OF AMERICA, Respondent. | NO. 79-5530 PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT |

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, NATION E. MEYER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on September 19, 1979.

OPINIONS BELOW

The Opinion of the Court of Appeals is unreported and is attached hereto as Exhibit "A".

JURISDICTION

The judgment of the Court of Appeals was filed September 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

QUESTION PRESENTED

Whether the crime of conspiracy to violate federal narcotics laws in violation of 21 U.S.C. §846 may be punished by the imposition of a special parole term?



STATUTORY PROVISIONS

21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (emphasis added)

21 U.S.C. §841(a)(1) makes it:

> [U]nlawful for any person knowingly and intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.

21 U.S.C. §841(b)(1)(A) provides, in part:

> In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment.

STATEMENT OF THE CASE

On April 5, 1976, Nation E. Meyer was indicted under 21 U.S.C. §846 for conspiring to sell a controlled substance. The object of the conspiracy was to violate 21 U.S.C. §841(a)(1), which makes it unlawful to sell a controlled substance.

On April 4, 1977, Nation E. Meyer pleaded guilty. On May 10, 1977, he was sentenced to three years in custody, with a

special parole term of two years.

On appeal, Mr. Meyer argued that the special parole term was not authorized under 21 U.S.C. §846. The Court of Appeals rejected that argument.

## REASON FOR GRANTING THE WRIT

### I

### THE CRIME OF CONSPIRACY TO VIOLATE FEDERAL NARCOTICS LAWS IN VIOLATION OF 21 U.S.C. §846 CAN BE PUNISHED ONLY BY "FINE OR IMPRISONMENT OR BOTH" AND NOT BY THE IMPOSITION OF ANY SPECIAL PAROLE TERM.

The essence of parole is release from prison before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Morrissey v. Brewer, 408 U.S. 471, 477 (1972). See also, United States v. Richardson, 483 F. 2d 516, 519 n.6 (8th Cir. 1973); 18 U.S.C. §4205 (time of eligibility for release on parole); 18 U.S.C. §4206 (parole determination criteria). Thus, a parolee is not technically serving his sentence during his release on parole. As stated in Morrissey v. Brewer, supra, at 478-479, the parole board has "the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules."

A "special parole term", however, is a "new type of restraint" that is "unique in that it is in addition to and not in lieu of any other parole term provided by law." United States v. Richardson, supra, at 518. The special parole term is separate from and begins after the regular sentence has been served, including any other parole. In the case of a violation of the conditions of the special parole term, the original term



of imprisonment will be increased by the entire period of the term, without regard to the length of time spent on special parole. United States v. Richardson, supra, at 518 n.5.

When a defendant is convicted of a violation of 21 U.S.C. §841(a)(1), three things can happen to that defendant. He can be (1) sentenced to a term of imprisonment; (2) given a fine; and (3) given a special parole. Any one or all three may be lawfully imposed. However, for violation of 21 U.S.C. §846 the statute expressly states that it is "punishable by imprisonment or fine or both."

The term "special parole" is expressly omitted from the language used in 21 U.S.C. §846 when it describes the permissible classifications of punishment for its violation. Thus, a logical reading of the statutes leads to the conclusion that a "special parole term" may not be imposed upon a person such as Nation E. Meyer, who has been convicted of 21 U.S.C. §846.

As stated in United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952), "when choice has been made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." In Petitioner Meyer's case, there is a vaguely worded sentencing statute, 21 U.S.C. §846. The harsher alternative interpretation would authorized imposition of the added special parole term to his sentence. This Court should not adopt that interpretation of §846. Certainly if that was the intended result, Congress could have expressly stated that violators of 21 U.S.C. §846 may be punished by "imprisonment or fine or special parole term or all three." Congress did not state it that way. Rather, Congress stated that violators of 21 U.S.C. §846 may be punished by "imprisonment or fine or both."

//

The controversy over whether 21 U.S.C. §846 authorizes imposition of a special parole term has led to conflicting opinions among the Circuit Courts of Appeals. The Third Circuit, in United States v. Mearns, 599 F. 2d 1296 (3rd Cir. 1979) has held that the courts may not impose a special parole term upon one who has been convicted of the conspiracy charge.

In direct conflict with the Third Circuit are cases in the Tenth Circuit, United States v. Jacobson, 578 F. 2d 863 (10th Cir. 1978), and the Fourth Circuit, United States v. Burman, 584 F. 2d 1354 (4th Cir. 1978), which have held that a special parole term is required as a penalty for a violation of the conspiracy charge of 21 U.S.C. §846.

## CONCLUSION

Based upon the foregoing, the Petitioner urges that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

Joseph F. Walsh

JOSEPH F. WALSH

JOSEPH F. WALSH and
G. TIMOTHY OKSMAN

Attorneys for Petitioner



UNPUBLISHED

# UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2103

United States of America,

Appellee,

v.

Nation E. Meyer,

Appellant.

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Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Woodrow W. Jones, District Judge.

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Submitted: March 12, 1979 Decided: September 19, 1979

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Before HAYNSWORTH, Chief Judge, HALL and PHILLIPS, Circuit Judges.

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(G. Timothy Oksman, Farino & Oksman, and Joseph F. Walsh on brief for the Appellant. Harold M. Edwards, United States Attorney, Phillip G. Kelley, Susan S. Craven, Assistant United States Attorneys, on brief for the Appellee.)

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EXHIBIT A

PER CURIAM:

Nation E. Meyer was indicted on charges of conspiring to sell a controlled substance, a violation of 21 U.S.C. § 846. He entered a plea of guilty and the district court sentenced Meyer to three years, with a special parole term of three years. The court later reduced the special parole term to two years. On appeal, Meyer challenges the voluntariness of his guilty plea and the sentence imposed.

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the court below carefully advised Meyer of the potential consequences of a guilty plea. United States v. Boone, 543 F.2d 1090 (4th Cir. 1976). In doing so, the court told him that his plea, if accepted, would require a minimum special parole sentence of four years. United States v. Sheppard, ____ F.2d ____ (4th Cir., Dec. 22, 1978) (No. 77-2370). The court did not, however, explain to Meyer that if a special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term. Meyer argues that because he was not advised of the additional incarceration he could receive if he violated his parole during the special parole term, he was not fully apprised of "the maximum possible penalty provided by law" as required by Rule 11.



EXHIBIT A

Moore v. United States, ____ F.2d ____ (4th Cir., Feb. 20, 1979) (No. 77-1986).

Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Therefore, we have held that a full explanation of the potential consequences of a special parole term is essential to comply with Rule 11. Moore v. United States, supra.

Nevertheless, in Bell v. United States, 521 F.2d 713, 715 (4th Cir. 1975), we held that the failure to advise a defendant of a special parole term does not invalidate a guilty plea unless the actual sentence imposed exceeds the maximum of which the defendant was advised. See United States v. Sheppard, supra. Here, the combined sentence of imprisonment and special parole actually received by Meyer was considerably less than the relevant maximum prison sentence of which he had been advised and, therefore, he is not entitled to relief. See Moore v. United States, supra; Johnson v. United States, 539 F.2d 1241 (9th Cir. 1976); Michel v. United States, 507 F.2d 461 (2d Cir. 1974).



EXHIBIT A

Meyer also contends that the conspiracy statute under which he was convicted, 21 U.S.C. § 846, authorizes only sentences of imprisonment or fine, or both, and does not authorize the imposition of the additional penalty of a special parole term provided in the substantive offense statute, 21 U.S.C. § 841(b). We specifically rejected this very argument in United States v. Burman, 584 F.2d 1354, 1357-58 (4th Cir. 1978), where we held that a special parole term is required as a penalty under § 846 whenever a sentence of imprisonment is imposed. Therefore, the imposition of a special parole term by the district court in the instant case was proper.

Accordingly, we dispense with oral argument and affirm the judgment of the district court.

AFFIRMED.



EXHIBIT A

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No. 79-5530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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NATION E. MEYER, PETITIONER

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UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# MEMORANDUM FOR THE UNITED STATES

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WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 3-5) that the district court erred by imposing a special parole term as part of his sentence for conspiracy to violate the narcotics laws.

1. Following a plea of guilty entered in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiring to distribute a controlled substance, in violation of 21 U.S.C. 846. Petitioner was sentenced to three years' imprisonment to be followed by a two-year term of special parole. The court of appeals affirmed (Pet. App. 1-4).

2. The question presented in this case is identical to the question presented in Bifulco v. United States, No. 79-5010, petition for certiorari granted October 9, 1979.[1/] In that case,

1/ We are sending petitioner's counsel copies of the government's response to the petition in Bifulco.



the court of appeals held that it is proper to impose a special parole term for a conspiracy to commit a narcotics offense, in violation of Section 846, whenever the underlying substantive offense itself requires imposition of a special parole term. Bifulco v. United States, 600 F.2d 407, 409-410 (2d Cir. 1979). With only one exception,[2/] each of the courts of appeals to have considered this question has reached the same conclusion. See United States v. Sellers, 603 F.2d 53, 58 (8th Cir. 1979), petition for certiorari pending No. 79-5485; Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1357-1358 (4th Cir. 1978), cert. denied, 439 U.S. 1113 (1979); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978). We believe that the decision in this case is correct and that imposition of a special parole term as part of petitioner's sentence was proper. Because this question is now pending before the Court, however, we suggest that the Court defer consideration of this petition pending disposition of Bifulco v. United States.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

NOVEMBER 1979

2/ United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979), petition for certiorari pending, No. 79-415.